No. 2921.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LOUIE DING

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. JEREMIAH NETERER, *Judge.*

Brief of Defendant in Error

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FIRST AND SECOND.

For purposes of discussion counsel's first and second subdivisional topic may be argued together.

We have no criticism to offer against the case of *United States vs. Dietrich,* 126 Fed. 675, cited by counsel, to the legal effect of an admission in the opening statement, but deny its force or ap-

plication in the instant case.

Counsel argues that, because the statement was made in Government's opening, that there was no connection between the defendants Ding and Toy, two conspiracies were described and admitted. Examine this opening statement carefully and you will find but one conspiracy spoken of throughout the entire narrative of the case. The white men who did the actual smuggling formed a conspiracy to bring in Chinese. Louie Ding came into the conspiracy for his own gain without regard to Toy. And Toy did the same with reference to Ding. Each knew he was entering a conspiracy to bring in Chinese.

It is well settled law that men may become members of a conspiracy and never meet each other. They may have joined it in its early stages or they may have come into the conspiracy as it was nearing completion. It is sufficient if two or more remained in it or were in it when the overt act was committed.

Any party coming into a conspiracy at any stage of the proceedings, with knowledge, is regarded as a party to all acts done by any of the

other parties, before or afterwards, in furtherance of the common design.

U. S. vs. Cassidy, 67 Fed. 698,
U. S. vs. Sacia, 2 Fed. 754, 578,
U. S. vs. Babcock, Fed. Cas. No. 14487, (3 Dill. 586),
Sherman vs. U. S., 156 Fed. 897, 912.

In view of what happened in the case it is difficult to see how the defendant was injured even admitting for argument's sake that separate conspiracies existed. The evidence at the opening of the government's case was limited to what was done between Lortie and Ding in making the preliminary arrangements in Seattle for the incoming Chinese, and to the transportation of five Chinese from Vancouver to Seattle. As to what was said between Toy and Kirkland concerning Toy's Chinese and what arrangements were made between Kirkland and Toy, and what Kirkland did in respect to the Chinese, the court's ruling in the Government's case in chief that Kirkland was not a competent witness effectually closed the door against all of this testimony. Toy's part in the case was a closed

incident early in the government's case.

The government's case thus narrowed down to evidence which showed that Kirkland brought two Chinese on board the launch at Vancouver. Lortie and Miller testified to this but beyond the statement that Kirkland brought them to the boat nothing appeared in the case touching Toy or a second conspiracy. Ding's case went to the jury on Lortie's statement with that of Miller, and other corroborating circumstances, to the effect that Ding intended that Lortie should bring eight but that they, Lortie and Miller, could and did secure only five Chinese in Vancouver to bring into the United States. Insofar as Ding was concerned it was a simple case of conspiracy between him and the whites to bring Chinese into this country in violation of law.

At the close of the government's case in chief, Toy was dismissed out of it upon ground that there was no evidence in the government's case to connect him with the conspiracy charged in the indictment, and Ding was left in the case as the sole defendant on trial, for Ding's white associates had pleaded

guilty. Ding was thus unhampered in making his defense. He had nothing to meet except the evidence involving him. Toy was never in the case after the opening statement and what Toy and Kirkland did or did not do never got before the court.

We do not, however, concede for a moment that the indictment is duplicituous in charging more than one crime nor that the opening statement suggested two conspiracies, nor do we concede that the proof disclosed two conspiracies. We should have argued had Kirkland stayed in the case as a witness that there was one general conspiracy to bring in Chinese similar to that of the case of *Dahl vs. United States,* decided by this court in 234 Fed. 618. We should have argued further that the testimony disclosed a general smuggling expedition to Vancouver and return, wherein Louis Ding furnished the Chinese letters of direction to the white men to bring in seven or eight Chinese and Toy furnished the directions for bringing in two; that it was a conspiracy into which came Ding at one time and Toy at another. The

opening statement showed this. The case simply broke down as to one defendant.

But the court's action took Kirkland as a witness and Toy as a defendant out of the case. Thus emasculated the case made out by the Government charged Ding alone with conspiring with others who had pleaded guilty to bringing Chinese from Vancouver to Seattle. The proof disclosed but one conspiracy.

"NO EVIDENCE THAT CHINESE BROUGHT IN WERE OF A PROHIBITED CLASS OF ALIENS."

The record in this case discloses an agreement between Lortie and Ding, entered into early in October, 1915, whereby Lortie was to go to Vancouver in his launch with his white associates, and return with such Chinese as he could procure from Louie Ding's co-workers and co-conspirators in Vancouver. Lortie was told by Ding he would be able to secure eight Chinese in Vancouver to be smuggled into this country. In fact, upon arrival in Vancouver, after presenting his Chinese letters, he was able to secure only five Chinese, and these

were brought to the United States on the launch by Miller and Kirkland.

In counsels' brief there is brief mention of the direct testimony bearing on the prohibited alien character of the Chinese who were actually brought in on the return trip from Vancouver to Seattle.

Counsel would narrow the proof down to the one statement, viz:

> "Q. Were they the laboring class of Chinese, do you know?
>
> A. Well I could not say."

(P. 35 Brief of Plaintiff in Error).

In addition to the direct question which was of no avail as indicated by the answer, there is an overwhelming amount of circumstantial evidence which shows conclusively that the Chinese belonged to the prohibited class. As a matter of strict law it is only necessary that the agreement between Ding and Lortie contemplated bringing in Chinese of the excluded class. We are dealing not with the consummated offense of violating section eleven of the Chinese Exclusion Act, viz: unlawfully bringing Chinese into the United States, but with a con-

spiracy to bring them into the United States which was followed by certain overt acts. As the Federal Courts have frequently said in discussing the offense of conspiracy, defined by Section 37 of the Penal Code, a conspiracy is not measured by its successful termination. The offense consists of the unlawful meeting of the minds followed by the overt act.

It would only be necessary to prove this unlawful understanding, together with an attempt in the form of an overt act to carry it out. A mere trip to the boat in Seattle for the purpose of going to Vancouver for Chinese would quite likely be sufficient to make out a criminal conspiracy, if made and carried out pursuant to a previous understanding, even though they were arrested at the dock. The kind of Chinese which were actually brought into the United States is quite immaterial except as it throws light on the enterprise as a whole.

Reviewing the circumstances of the proof as disclosed by the printed record, we find the following:

Lortie, Miller and Kirkland arranged to make a smuggling trip to Vancouver. Lortie saw Ding

and arranged to bring in Chinese for Ding, he, Ding, giving Lortie a Chinese letter which called for eight Chinese. Lortie was to receive one hundred dollars per head. This meeting took place in Louie Ding's gambling house on King Street, Seattle. Lortie made his arrangements with Miller and Kirkland and went with them to Vancouver. There they procured seven Chinese altogether and returned with them to Seattle. Lortie left the smuggling launch and his white associates and returned to Seattle alone by other conveyance.

When Miller and Kirkland arrived in Seattle harbor, they went to the foot of Harrison Street, which is some distance from the center of the city in a sequestered part of the waterfront. The party arrived after dark. One of the white men telephoned Lortie, who went out to the Harrison Street wharf. Here he met Miller, who turned over five Chinese to him. Lortie then took them in charge and brought or lead them to a point near the Milwaukee Hotel, in Chinatown, where he delivered them to one China Dan, for Louie Ding. Later Miller and Lortie went to a flat, No. 1037 Main

Street, Seattle, where Lortie received his pay from Ding. The Chinese were brought directly from Vancouver to Seattle. They were not taken to the Chinese Inspector of the Immigration Service. On the contrary they were brought to a sequestered place on the Seattle waterfront in the darkness and there landed and then taken by Lortie to Chinatown. Men are not paid money at the rate of one hundred dollars per head to bring Chinese of the priveleged class from Vancouver to the United States. If these men were of the privileged class of Chinese they would have procured entry through the United States Immigration office in Vancouver. The United States had formerly and at the time in question a special arrangement for the examination of American bound Chinese in Vancouver and an office there for that purpose, in addition to the service maintained at the Chinese Entry Ports in the United States. Judicial notice will be taken of the law which requires Chinese to enter at certain designated ports in the United States. The law requires them to submit also to a very rigid examination, both under the Chinese Exclusion Acts and the general immigration laws. Honest

Chinese do not enter the United States in small launches in the darkness, and without submitting themselves to the authorities for examination, debark in the darkness and go to Chinatown, to be swallowed up in the Chinese underworld.

Again, taking judicial notice of the requirements of the law, together with the manner of entry proven in this case, it is clear that these Chinese were of the excluded class, to-wit, laborers. The priveleged class include the Chinese Government officials and representatives, merchants, tourists, scientists and students. These are well-to-do Chinese citizens who are duly accredited with passports, official records and identification papers, and they never find it necessary to come in by the "underground railway."

These facts, together with the agreement for the entry between Lortie and Ding, and the Chinese letters referred to in the evidence, will leave no doubt in the minds of the court that the proof in this case disclosed a conspiracy to bring in Chinese of the prohibited class. (Trans. pp. 37 to 60, inc.).

The case of *Dahl vs. U. S.*, decided by this

court in 234 Fed. 618, is enlightening upon this point. An indictment similar to the one at bar, drawn by the writer was sustained in that case as one charging a conspiracy in general terms to bring in Chinese. And the indictment in the instant case was amply supported by the evidence.

The proof shows that the conspiracy contemplated bringing in Chinese generally and that they were of the excluded class.

THIRD.

Counsel's remaining claim of error arising out of the joinder of defendants, Toy and Ding, is found in his third brief subdivision where it is argued that Ding was denied the number of challenges the law allows to a defendant charged with a felony other than murder or treason, to-wit, ten.

The court required defendants Toy and Ding to join in their challenges and allowed them only ten jointly.

Section 287 of the Judicial Code of the United States is an effectual answer to this contention, to-wit:

"Sec. 287, Judicial Code, 36 Stat. at L. 1166, Comp. St. 1911, p. 241, 1912 Supp. F. S. A. v. 1, p. 248. 'When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to six peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers.' "

See also the case of *Emanuel vs. United States,* 196 Fed. 317, charging a criminal conspiracy, which sustains the statute above in its application to criminal cases.

The *Betts* case cited by counsel for Plaintiff in Error is distinguished and explained in the *Emanuel* case in the following statement:

"The case mainly relied on by the defendant is *Betts vs. United States,* 132 Fed. 452,

> but in that case there was no consolidation. Nine indictments were tried at the same time. In the case at bar, however, the several indictments were consolidated into a single cause with one plaintiff and five defendants."

In reply to the second claim of error in counsel's third subdivision wherein it is urged that reversible error was committed in allowing the jurors who sat in the first case against Louis Ding to remain on the panel from which the second jury was selected, we first observe that no juror who sat on the first Ding case was permitted to serve on the second (instant) case. The record discloses that counsel exhausted ten challenges and that with these ten, and one or two others who were excused for cause, the twelve jurors who sat in the first Ding case were excused. (See Transcript pp. 63 to 65, inc.). While there is some confusion in the cases as to whether jurors who sat upon a previous trial of the defendant then charged with another crime are competent to sit upon a later case involving the same defendant, yet we believe the weight of authority sustains this proposition. This point has not been considered by the federal courts

in recent years. However, in *United States vs. Watkins,* Fed. Cas. No. 16,649, this proposition was sustained. The court held that no objection could be raised to a juror because he had been one of the jurors in another case against the same defendant for a different offense.

See also *Commonwealth vs. Hill,* 86 Mass. (4. Allen) 591.

Again in the case of *United States vs. Wilson,* Fed. Cas. No. 16,730, it was held not to be ground of challenge that a juror sat in a previous case and returned a verdict of guilty, although it was good cause to submit his indifference to triers. The statute now places the burden of trying the juror's *voir dire* qualifications upon the court.

See also *Patterson vs. State,* 48 N. J. L., 381; 4 Atl. 449;

See also Vol. 31, *Century Digest, "Jury,"* Sec. 429;

See also cases cited in Vol. 12, *Dec. Dig. "Jury,"* Sec. 95;

See also *Abbotts Trial Brief* (Criminal Causes) Sec. 294,

where the text is quoted as follows:

> "Having served as a juror in another cause against the same defendant unless involving the same facts, is not a disqualification."
>
> *Thornton on Juries,* Sec. 101;
>
> See also *Baker vs. Harris* (Thirston) N. C. 277.

FOURTH.

In answering counsel's fourth brief division upon the question of Kirkland's competency, counsel for defendant in error find themselves in a rather anomalous position upon the merits of the question raised. We say anomalous, for we find ourselves upon both sides of this question and are now in a position of one astride a fence in doubt which side to descend. William Kirkland was a defendant in the case. After arrest he very frankly told the officers charged with prosecution all of the details of his offense and the part each one of the several defendants took in the criminal enterprise made the subject of indictment in the instant case. He expressed his entire willingness to appear as a government witness after his own plea had been

taken. He was called on behalf of the government as a witness. As he stepped forward to be sworn, Mr. Riddell for the defendant Toy, objected to him being sworn upon the ground that he was an atheist and as such incompetent to testify in any cause. We were then called upon to resist this objection, or at least to meet and answer it if possible. We cited such cases as were available over night and the next morning the court after some further discussion sustained Mr. Riddell's contention in respect to Kirkland and refused to allow him to be sworn as a witness. This was after his *voir dire* examination had disclosed the fact that Kirkland did not believe in any future reward or punishment, but on the contrary believed that one received punishment in this world for wrong doing.

The case against the defendant Toy depended almost entirely on Kirkland though there were some corroborating circumstances. When the court held Kirkland disqualified by reason of his lack of belief in a Supreme Being who would punish wrong doing, Toy at the close of the government's case moved for a directed verdict which was granted, and thereafter

the cause proceeded against Ding alone who was the only defendant left on trial. During the presentation of Ding's defense, Judge Bell, who was trial counsel in this case, called the same Kirkland to the stand and offered him as a defense witness for Ding. The court already having disqualified him as a government witness, refused to allow him to testify unless the government would agree that he might. Believing that it is a poor rule which does not work both ways counsel for the prosecution objected.

We now find ourselves supporting our judgment of conviction in this cause. Before attempting to discuss this question upon the merits it occurs to us that there is one insuperable objection to counsel's position, viz., that he has not shown that prejudicial error resulted from the court's ruling. His proffer of the witness was not accompanied by any offer to prove a fact or series of facts material and necessary to Ding's defense. From aught that appears counsel may have wished to prove some immaterial and inconsequential matter. It may have been material but cumulative

only. Materiality or competency does not necessarily go to the value, weight or quality of the evidence, for in the chain of events, the fact while material, may have been remote, inconsequential and of little or doubtful value; and, until its value is shown by an offer of proof the court cannot say whether its rejection constituted prejudicial and therefore reversible error or whether the error was inconsequential and harmless.

The rule in the federal court seems to be that an appellate court will not review alleged errors in the admission of evidence unless the objection clearly states the reason why the evidence is inadmissible. In commenting upon this rule the court of appeals for the Sixth Circuit, in the case of *Steers vs. United States,* 192 Fed. 1, said:

> "Error cannot well be assigned on such a record."

Also *Kern vs. United States,* in the same circuit, reported in 169 Fed. 617:

> "On the trial counsel for the defendant offered in evidence the original records and files in the case in the state court. On objec-

> tion by the District Attorney on the ground, among others, that the originals were not receivable but certified copies only, they were excluded. Assuming that the objection was untenable counsel for the defendant did not take the necessary steps to save his point. The contents of the records and files are not shown and it does not appear that they contained anything which would serve the purpose for which they were offered. There was no statement to the court of any particular matter contained therein which would be relevant to the issue. In these circumstances there is nothing to show that the defendant was harmed by the exclusion of the evidence."

This and many other cases sustains the familiar rule that the rejection of evidence will not be reviewed in an appellate court unless its materiality and competency is shown. In the case at bar there was nothing to show the materiality of Kirkland's testimony, and we cannot but feel that this offer of a government witness who had been rejected by the court in the presentation of the government's case, was but a strategic step by adroit and learned counsel to inject reversible error into the record without any real purpose to prove any material

fact by this particular witness.

Coming to the merits of the question we have carefully reviewed the leading case of *Omichund vs. Barker,* decided by Lord Chief Justice Willes in 1744. The rule was there announced in passing upon the qualification of a Hindu, that a belief in a Supreme Being who would punish false swearing either in this life or in some future life was sufficient to qualify a witness and permit him to take an oath. This case was later approved in the case of *Attorney General vs. Bradlaugh,* decided in 1885, and reported in 14 Law Rep. Q. B. D. 696. Here a member of Parliament was on trial in an action brought by the government to recover penalties and fines in two counts for 500 pounds each for violating the Parliamentary Oaths Act, in that he had voted in Parliament without taking an oath. The member in question did not believe in the existence of a Supreme Being, and the penalty was sustained by the High Court of Appeals in England. In this lengthy and well considered case the earlier case of *Omichund vs. Barker, supra,* was discussed at length. It was said by the judges in the *Bradlaugh*

case that the decision of Justice Willes, Master of the Rolls, had been adopted as the law of England upon the subject from the time the opinion was rendered in 1744 to the time of the discussion of the *Bradlaugh* case, and that it undoubtedly establishes the law of England upon that subject.

It will be noted that the *Omichund* case requires a belief in a Supreme Being who administers punishment. While there was in the record some testimony by Kirkland to the effect that he believed one received his punishment in this life, yet he made reply to Judge Neterer that he did not believe it came from God. This question was put to the defendant:

> "Q. As a matter of fact your belief is that the punishment you receive in this world comes from yourself and from the men in the world?
>
> A. Yes.
>
> Q. And not from God?
>
> A. No, I don't think it comes from God."

It will thus be seen that Kirkland's disqualification went to the absolute disbelief in God or a Supreme Being. This belief in a Supreme Being

was one of the essential things, according to the *Omichund* case. It is true Kirkland brought himself half way within the rule by saying that he believed one received his punishment on this earth, but his case is differentiated from the *Omichund* case, for in that case the Hindu believed that he would receive punishment from a Supreme Being, for making false oath.

In order to clearly acquaint this court with Justice Willes' ruling, we quote at some length from the opinion of the High Court of Appeals in 1885 in the *Bradlaugh* case as follows:

> "What is the law with regard to that? Can a person in that frame of mind (the jury found Bradlaugh had no belief in a Supreme Being), according to the law of England, and according to the intention of this Act of Parliament, take an oath? Now the law has been accepted and acted upon with regard to that point in accordance with and as governed by the decision given in *Omichund vs. Barker* ever since that case was decided, and the law has been by every judge who has had to speak of it, really and truly according to the judgment of Willes C. J. in that case. His has always been taken to be the most prominent and most

satisfactory judgment. His judgment is in this form: 'I am of opinion that such infidels as believe in a God, and that He will punish them if they swear falsely, may and ought, to be admitted as witnesses in this, though a Christian country.' Observe the care with which he puts it, 'such infidels as believe in a God, and that He will punish them'—he does not say when, where, or how—'if they swear falsely.' Now we come to the next, 'and on the other hand I am clearly of opinion that such infidels (if any such there be) who either do not believe in a God'—that is the first of these findings, 'or if they do, do not think,' this is the alternative, that is, although they do—'if they do, do not think that he will either reward or punish them in this world or the next, cannot be witnesses in any case nor under any circumstances. It is not only 'in any case' but 'nor under any circumstances' for the plain reason, because an oath cannot possibly be any tie or obligation upon them. Therefore there is no necessity that the person taking the oath should believe that he will be liable to be punished in a future state. If there be any belief in a religion according to which it is supposed that a Supreme Being would punish a man in this world for doing wrong, that is enough; but if he does not believe in a God, or if believing in a God he does not think that

> God will either reward or punish him in this world or the next, in either case according to the law of England as here declared a man cannot be a witness in any case, or under any circumstances, 'He cannot be a witness.' "

The common law authorities cited by Judge Neterer are set forth at length in the court's opinion, which is part of the printed record in this case. (See pp. 16-21, inc.).

We have come to conclude that Judge Neterer was right when you consider Kirkland's testimony that he did not believe in a God or a Supreme Being.

In a record in our judgment free from error, there is disclosed substantial and credible evidence establishing the defendant's guilt as charged in the indictment. Judgment of the lower court should be affirmed.

Respectfully submitted,

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